Supreme Court, U.S.
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No. 03-1085

IN THE

Supreme Court of the United States

SABRI SAMIRAH,

Petitioner,

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; CYNTHIA J. O'CONNELL, INTERIM DISTRICT DIRECTOR FOR INTERIOR ENFORCEMENT, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Government's Response Misstates Relevant Facts

The government's opposition brief significantly misstates the facts surrounding Dr. Samirah's legal immigration status. This error leads the government to assert incorrectly that Dr. Samirah has defrauded the immigration system by being unlawfully present in the United States, an assertion made repeatedly by the government in its opposition brief. *See* Resp'ts' Opp'n Br. at 13. This is not accurate.

The government's representation of Dr. Samirah's status within the immigration system fails to cite to the record below, and there is nothing in the record to support the

government's allegations. On the contrary, the government made some of these allegations below and *withdrew* them because the government admitted it was wrong. *See* Resp't. Reply Mem. filed in district court (Mar. 24, 2003) at 2 n.3 (admitting that the government's allegation that Dr. Samirah had not obtained his doctorate degree "was not correct"). Now, Dr. Samirah is once again left to defend himself against innuendo and misstatements, which serve mainly to highlight the fact that Dr. Samirah has never had an opportunity to be heard on these matters before the agency. These misstatements demonstrate the dangers facing millions of legal immigrants who cannot rely on the rule of law as set forth by Congress.

Dr. Samirah has never been "unlawfully present" in the United States, as the government repeatedly asserts in its opposition brief. "Unlawful presence" is codified and defined at 8 U.S.C. § 1182(a)(9)(B).[1] While the government points out that Dr. Samirah's first application for adjustment of status was denied on March 29, 1995, its argument ignores the fact that his application was denied without prejudice to refiling under 8 U.S.C. § 1255(i), and that Dr. Samirah did in fact file a second I-485 application under that section less than 45 days after the denial of the first application. *See* App. at 1a. This second application for adjustment of status, filed on April 12, 1995, and stamped as received by the INS on May 10, 1995, has not been denied to date. *Id.*

This is of no small significance for the underlying case because the pending application kept Dr. Samirah in lawful

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[1] The effective date provisions of § 1182(a)(9)(B) are uncodified. The uncodified provisions provide that the term "unlawful presence" does not apply to presence in the U.S. prior to April 1, 1997, when 8 U.S.C. § 1182(a)(9)(B) became effective. *See* § 301(b)(3) of Div. C. of Pub. L. 104-208. If the government means to imply that Dr. Samirah was unlawfully present prior to 1997, such a suggestion has no support in the law.

status during the years in question. While a properly filed application for residency is pending, an immigrant is considered to be in a period of stay authorized by the Attorney General, as the agency itself has decided. *See* App. at 15a. Under the agency's interpretation, while a "[p]roperly filed, affirmative application for adjustment of status under section 245 of the Act" is pending, the applicant is considered to be in a period of stay authorized by the Attorney General. *Id.* at 0123. There is no dispute that Dr. Samirah's second application for adjustment of status was properly filed and was an affirmative application for residency. Consequently, the government's argument that Dr. Samirah was "unlawfully present" in the United States is without merit.

The fact that the government obtusely categorizes Dr. Samirah as an alien unlawfully present in the United States without even the slightest acknowledgment of his affirmative application for adjustment of status merely underscores the fact that Dr. Samirah has received no constitutionally sufficient process. The government's willingness to ignore the record emphasizes the need for Congress's requirement that such determinations be reviewed independently.

The Seventh Circuit's Decision Precludes Courts from Exercising Jurisdiction Over Constitutional and Statutory Questions

Dr. Samirah asserted jurisdiction under 28 U.S.C. § 1361 (mandamus); 28 U.S.C. § 1331 (federal question) in conjunction with 5 U.S.C. § 701 *et seq.* (the Administrative Procedure Act); and 28 U.S.C. § 2241 (habeas). The Seventh Circuit held that the first two jurisdictional grounds were foreclosed by 8 U.S.C. § 1252(a)(2)(B)(ii), and that the § 2241 claim failed because Dr. Samirah was not "in custody."[2] The government argues that the Seventh Circuit's

[2] *See Samirah v. Ashcroft*, 335 F.3d 545, 549-50 (7th Cir. 2003).

decision does not run afoul of this Court's holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), where this Court rejected a broad application of § 1252(a)(2)(B) to questions of statutory construction: "[t]he aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority . . . [a]nd the extent of that authority is not a matter of discretion." *Id.* at 688.

Dr. Samirah challenges the extent of the government's authority to exclude him without notice or hearing. This argument does not relate to the government's discretionary decision to revoke advance parole. The fallacy of the Seventh Circuit's holding relating to § 1252(a)(2)(B)(ii) is perhaps more evident if the order of the analysis is reversed: (1) that habeas review was unavailable because Dr. Samirah is no longer "in custody" for purposes of § 2241; and (2) that no other review of Dr. Samirah's statutory and constitutional challenge was available due to 8 U.S.C. § 1252(a)(2)(B)(ii). Considered in this order, it is clear that the Seventh Circuit misreads § 1252(a)(2)(B)(ii) as precluding review of Dr. Samirah's statutory and constitutional claims without even addressing traditional presumptions in favor of review of constitutional and statutory questions.

At the time Dr. Samirah traveled abroad with the government's permission, he had both a liberty interest and a property interest in his pending application for residency. The government argues that *Landon v. Plascencia*, 459 U.S. 21 (1982), stands only for the proposition that returning permanent residents have due process rights, but this is an obtuse reading of that case. *Landon* was premised on the unexceptionable proposition that "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Id.* at 34. This led to this Court's express adoption in *Landon* of a "sliding scale" test for due process. *Id.* at 32-33. Dr. Samirah does not argue

that he has all of the rights of a permanent resident, but an individual in his circumstance has the right to notice and an opportunity to be heard.[3]

Finally, Dr. Samirah reiterates that Congress has required by statute that the government follow the procedures outlined in 8 U.S.C. § 1229a before it deports or excludes an alien. 8 U.S.C. § 1229a(a)(3). The government is correct in noting that the Seventh Circuit did not rule on this argument, but it is the absence of such a ruling that is so troubling about this case. For purposes of jurisdiction, Dr. Samirah's statutory arguments must be taken as true; yet, the Seventh Circuit Court held that even if Dr. Samirah had been excluded from the United States in violation of the Constitution and in violation of the statute passed by Congress, federal courts had no jurisdiction to rectify the situation.

The Constitution gives Congress the authority to set "uniform rules" regarding naturalization (U.S. Const. art. I, sec. 8, cl. 4) but the rule adopted by the Court of Appeals would

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[3] The government incorrectly relies on *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206 (1953), to characterize Dr. Samirah as an alien on the threshold of initial entry. *See* Resp'ts' Opp'n Br. at 14. But *Mezei* is illustrative for the opposite reason. In *Mezei*, the alien had traveled abroad without authorization, and was gone for a period of 19 months. *Id.* at 214. Moreover, he was excluded pursuant to an Act of Congress. Here, by contrast, Dr. Samirah traveled with advance authorization from the government, was outside the country for less than a month, and was excluded (as must be assumed for purposes of jurisdiction) in direct *contravention* of statute. These facts are far more similar to those in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), where an alien departed the country with the government's knowledge and approval. The alien in that case was found to have a due process right to a hearing before being excluded or deported from the country. *Id.* at 600 ("We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien").

permit the "uniform" rules set by Congress to be disregarded by the Executive at will. If the courts have no power to reverse Executive actions that are unlawful or unconstitutional, then there is no effective check on the authority of the Executive, and Congress's constitutional right to enact uniform laws is encumbered.

Such a ruling is pernicious and corrosive, requiring immediate attention by this Court. Already, the Seventh Circuit has applied *Samirah* to foreclose review of a visa revocation in *El-Khader v. Monica*, holding that El-Khader's argument that the government had applied the wrong legal standard was unreviewable because of the discretion involved in the statute. __ F.3d __, 2004 WL 909161, at *1 (7th Cir. April 29, 2004). The court found no relevant distinction between El-Khader's visa petition revocation and Dr. Samirah's advance parole revocation, *id.* at *3; arguments of pure law in both cases were held beyond judicial oversight because of overall discretion given to the agency.

In the Seventh Circuit, as demonstrated by *El-Khader*, an immigrant cannot obtain review even of errors of law or constitutional violations, due to a provision that purports only to restrict review of discretionary decisions. Such a conclusion runs flatly contrary to this Court's recent jurisdictional holdings in *INS v. St. Cyr*, 533 U.S. 289, 313-14 (2001); *Zadvydas*, 533 U.S. at 687-88, and *Demore v. Kim*, 538 U.S. 510, 516-17 (2003) (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988), and *Johnson v. Robison*, 415 U.S. 361, 367 (1974)), all of which found jurisdiction to review constitutional arguments and arguments of pure law.

Dr. Samirah challenges the constitutionality of the government's interpretation of the statute and the authority of the government to exclude him by the means at issue herein. Longstanding precedent presumes that the courts have the capacity and the obligation to rule on such questions. The Executive is inclined to insulate its actions from judicial

oversight, but liberty and the rule of law require that such inclinations be checked by the courts of a free people.

CONCLUSION

Petitioner respectfully requests this Court to GRANT the Petition for Certiorari, and to REMAND this case to the United States Court of Appeals for the Seventh Circuit for further action in the case.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. DEPARTENT OF JUSTICE
Immigration and Naturalization Service

Application to Register Permanent
Residence or Adjust Status

START HERE—Please Type or Print

Part 1. Information about you.

Family Name: SAMIRAH
Given Name: SABRI
Middle Initial: I
Address: c/o
Street Number and Name: 4342 N. Kedvale
Apt: 1B
City: Chicago
State: Ill.
Zip Code: 60641
Date of Birth: 1/1/1967
County of Birth: Jordan
Social Security: 338-78-2964
A # (if any): 73 354 759
Date of Last Arrival: 10/31/90
I-94 #: 47627968800
Current INS Status: F-1
Expires on: 12/31/99

Part 2. Application Type (check One)

Am applying for adjustment to permanent resident status because:

a. ☒ an immigrant petition giving me an immediately available immigrant visa number has been approved (attach a copy of the approval notice), or a relative, special immigrant juvenile, or special immigrant military visa petition filed with

this application will give me a immediately available visa number if approved.

b. My spouse or parent applied for adjustment of status or was granted lawful permanent residence in an immigrant visa category which allows derivative status for spouses and children.

c. I entered as a K-1 fiance(e) of a U.S. citizen whol I arried within 90 days of entry, or I an the K-2 child of such a fiance(e) (attach a copy of the fiance(e) petition approval notice and the marriage certificate).

d. I was granted asylum or derivative asylum status as the spouse or child of a person granted asylum and am eligible for adjustment.

e. I am a native or citizen of Cuba admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least 1 year.

f. I am the husband, wife, or minor unmarried child of a Cuban described in (e) and am residing with that person, and was admitted or paroled into the U.S. after January 1, 1959, and thereafter have been physically present in the U.S. for at least 1 year.

g. I have continuously resided in the U.S. since before January 1, 1972.

h. Other-explain _____.

Am already a permanent resident and an applying to have the date I was granted permanent residence adjusted to the date I originally arrived in the U.S. as a immigrant or parolee, or as of May 2, 1964, whichever is later, and (check One)

i. I am a native or citizen of Cuba and meet the description in (e), above.

j. I am the husband, wife or minor unmarried child of a Cuban, and meet the description in (f), above.

Continued on back

City/Town/Village of birth: Amman
Current occupation: Student
Your mother's first name: Mariam
Your father's first name: Ibrahim
Give your name exactly how it appears on your arrival/Departure Record (Form 1-94): Sabri Samirah
Place of last entry into the U.S. (City/State): New York, N.Y.
Were you inspected by a U.S. Immigration Officer?
☐Yes ☐ No
In what status did you last enter? (visitor, Student, exchange, alien, crewmen, temporary worker, without inspection, etc.)
F-1 (Student)
Nonimmigrant Visa Number: 001499
Consulate where Visa was issued: Amman-Jordan
Date Visa was issued: 10/22/1990
Sex: ☒ Male ☐ Female
Marital Status: ☒ Married ☐ Single ☐ Divorced
☐ Widowed
Have you ever before applied for permanent resident status in the U.S.? ☐ No ☒ Yes (give date and place of filing and final disposition): 9/29/94 Chicago, Denied

List your present husband/wife, all of your sons and daughters (if you have none, write "none". If additional space is needed, use separate paper).

Family name: SROURI
Given name: SIMA
Middle Initial: K
Date of Birth: 2/6/67
Country of birth: Jordan
Relationship: wife
Applying with you: ☒ Yes ☐ No
Family name: Samirah
Given name: Ibraheem
Middle initial: S

Date of birth: 8/20/91
Country of birth: U.S.A.
Relationship: son
Applying with you: ☒ Yes ☐ No
Family name: Samirah
Given name: Khaled
Middle initial: S
Date of birth: 8/22/93
Country of birth: U.S.A.
Relationship: Son
Applying with you? ☒ Yes ☐ No

List your present and past membership in or affiliation with every political organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place since your 16th birthday. Including any foreign military service in this part. If none, write "none". Include the name of organization, location, dates of membership from and to, and the nature of the organization. If additional space is needed, use separate paper.

None

Part 3. Processing information. (continued)

Please answer the following questions. (If your answer is "yes" on any one of these questions, explain on a separate piece of paper. Answering "yes" does not necessarily mean that you are not entitled to register for permanent residence or adjust status).

1. Have you ever, in or outside the U.S.:

   a. knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested?

   b. been *arrested*, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?

c. been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action?

d. exercised diplomatic immunity to avoid prosecution for a criminal offense in the U.S.?

☒ Yes ☐ No

2. Have you received public assistance in the U.S. from any source, including the U.S. government or any state, county, city, or municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future?

☐ Yes ☒ No

3. Have you ever:

a. within the past 10 years been a prostitute or procured anyone for prostitution, or intend to engage in such activities in the future?

b. engaged in any unlawful commercialized vice, including, but not limited tc, illegal gambling?

c. knowingly encouraged, induced, assisted, abetted or aided any alien to try to enter the U.S. illegally?

d. illicitly trafficked in any controlled substance, or knowingly assisted, abetted or colluded in the illicit trafficking or any controlled substance?

☐ Yes ☒ No

4. Have you ever engaged in. conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to, any person or organization that has ever engaged or conspired to engage, in sabotage, kidnapping, political assassination, hijacking, or any other form of terrorist activity?

☐ Yes ☒ No

5. Do you intend to engage in the U.S. in:

a. espionage?

b. any activity a purpose of which is opposition to, or the control or overthrow of, the Government of the United States, by force, violence or other unlawful means?

c. any activity to violate or evade any law prohibiting the export from the United States of goods, technology or sensitive information?

☐ Yes ☒ No

6. Have you ever been a member of, or in any way affiliated with, the Communist Party or any other totalitarian party?

☐ Yes ☒ No

7. Did you, during the period March 23, 1933 to May 8, 1945, in association with either the Nazi Germany or any organization or government associated or allied with the Nazi Government of Germany, ever order, incite, assist or otherwise participate in the persecution of any person because of race, religion, national origin or political opinion?

☐ Yes ☒ No

8. Have you ever engaged in genocide, or otherwise ordered, incited, assisted or otherwise participated in the killing of any person because of race, religion, nationality, ethnic origin, or political opinion?

☐ Yes ☒ No

9. Have you ever been deported from the U.S. or removed from the U.S. at government expense, excluded within the past year, or are you now in exclusion or deporation proceedings?

☐ Yes ☒ No

10. Are you under order of civil penalty for violating section 274C of the Immigration Act for use of fraudulent documents, or have you, by fraud or willful misrepresentation of a material fact, ever sough to procure, or procured, a visa, other documentation, entry into the U.S., or any other immigration benefit?

☐ Yes ☒ No

11. Have you ever left the U.S. to avoid being drafted into the U.S. Armed Forces?

☐ Yes ☒ No

12. Have you ever been a J nonimmigrant exchange visitor who was subject to the 2 year foreign residence requirement and not yet complied with that requirement or obtained a waiver?

☐ Yes ☒ No

13. Are you withholding custody of a U.S. Citizen child outside the U.S. from a person granted custody of the child?

☐ Yes ☒ No

14. Do you plan to practice polygamy in the U.S.?

☐ Yes ☒ No

Continued on back

Part 4. Signature. (Read the information on penalties in the instructions before completing this section. You must file this application while in the United States.)

I certify under penalty of perjury under the laws of the United States of America that this application, and the evidence submitted with it, is all true an correct, authorize the release of any information from my records which the Immigration and Naturalization Service needs to determine eligibility for the benefit, I am seeking.

Signature: /s/ Sabri Samirah
Print You Name: SABRI SAMIRAH
Date: 4/12/95
Daytime Phone Number: (312) 481-0352

Please Note: If you do not completely fill out this form, or fail to submit required documents listed in the instructions, you may not be found eligible for the requested document and this application may be denied.

Part 5. Signature of person preparing form if other than above. (Sign Below)

I declare that I prepared this application at the request of the above person and it ti based on all information of which L have knowledge.

Signature:
Print Your Name:
Date:
Day time Phone Number:
Firm Name and Address:

U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Supplement A to Form I-485

START HERE—Please Type or Print

Part 1. Information about Applicant

Family Name: SAMIRAH
First Name: SABRI
Middle Name: IBRAHIM
Address: c/o
Street Number and Name: 4342 N. Kedvale
Apt. Suite: 1.B
City: Chicago
State or Privince: ILL.
Country: USA
Zip/Postal Code: 60641
INS: A#
Date of Birth: 1/1/67
Country of Birth: Amman-Jordan

Part 2. Basis for Eligibility (check one)

1. On Form 1-485, Part 2, I checked application type (check one):

a. ☒ An immigrant petition
(go to #2)
b. ☐ My spouse or parent applied
(go to #2)
c. ☐ I entered as a K-1 finance
Stop Here. Do not file this form.
d. ☐ I was granted asylum
Stop Here. Do not file this form.
e. ☐ I am a native or citizen of Cua
Stop Here. Do not file this form.
f. ☐ I am the spouse or child of a Cuban
Stop Here. Do not file this form.

g. ☐ I have continuously resided in the U.S.
Stop Here. Do not file this form.
h. ☐ Other
Go to #2.
i. ☐ I am already a permanent resident
Stop Here. Do not file this form.
j. ☐ I am already a permanent resident and an the spouse or child of a Cuban
Stop Here. Do not file this form.

2. I have filed Form I-360; and I am applying for adjustment of status as a special immigrant juvenile court dependent (check one):

☐ Yes Stop Here. Do not file this form.
☒ No No Go to #3.

3. I have filed Form I-360; and I am applying for adjustment of status as a special immigrant who has served in the United States Armed Forces *(check one)*:

☐ Yes Stop Here. Do not file this form.
☒ No No Go to #4.

4. I last entered the United States *(check one)*:

☐ Legally as a crewman (D-1/D-2 visa).
Go to #11.
☐ Without inspection.
Go to #11.
☐ Legally in transit without visa status.
Go to #11.
☐ Legally without a visa.
Go to #5.
☐ Legally as a parolee.
Go to #5.
☒ Legally with another type of visa (show type F-1)
Go to #5.

5. I last entered the United States legally without a visa as a visitor for tourism or business; and I am applying for adjustment of status as the spouse, unmarried child less than 21 years old, parent, widow or widower of a United States citizen *(check one)*:

☐ Yes Stop Here. Do not file this form.
☒ No Go to #6.

6. I last entered the United States legally as a parolee, or with a visa (except as a crewman), or as a Canadian citizen without a visa; and I am applying for adjustment of status *(check one)*:

☐ As the spouse, unmarried child less than 21 years old, parent, widow or widower of a United States citizen.
Stop Here. Do Not File This Form.
☐ As a special immigrant retired international organization employee or family member of an international organization employee or as a special immigrant physician; and I have filed Form I-360.
Stop Here. Do Not File This Form.
☒ Under some other category. Go to #7.

7. I am a national of the (former) Soviet Union, Vietnam, Laos or Cambodia who last entered the United States legally as a public interest parolee after having been denied refugee status; and I am applying for adjustment of status under Public Law 101-167 *(check one)*:

☐ Yes Stop Here. Do Not File This Form.
☒ No Go to #8.

8. I have been employed in the United States after 01/01/77 without INS authorization *(check one)*:

☐ Yes Go to #9.
☐ No Go to #10.

9. I am applying for adjustment of status under the Immigration Nursing Relief Act (INRA); I was employed without INS authorization only on or before 11/29/90; and I have always maintained a lawful immigration status while in the United States after 11/05/86 *(check one):*

☐ Yes Stop Here. Do Not File This Form.
☒ No Go to #10.

10. I am now in lawful immigration status; and I have always maintained a lawful immigration status while in the United States after 11/05/86 *(check one):*

☐ Yes Stop Here. Do Not File This Form.
☐ No, but I believe that INS will determine that my failure to be in or maintain a lawful immigration status was through no fault of my own or for technical reasons. Stop Here. Do Not File This Form, and attach an explanation to your Form I-485 application.
☐ No. Go to #11.

11. I am unmarried and less than 17 years old *(check one):*

☐ Yes. Stop Here. File This Form and Form I-485. Pay only the fee required with Form 1-485.
☒ No. Go to #12.

12. I am the unmarried child of a legalized alien and am less than 21 years old, or I am the spouse of a legalized alien; and I have attached a copy of my receipt or approval notice showing that I have properly filed Form I-817, Application for Voluntary Departure under the Family Unity Program *(check one):*

☐ Yes. Stop Here. File This Form and Form I-485. Pay only the fee required with Form 1-485.
☒ No. Go to #13.

13. File This Form and Form I-485. You must pay the additional sum:

$130.00—Fee required with Form I-485* *and*
$650.00—Additional sum under section 245(i) of the Act

$780.00—Total amount you must pay.

* If you filed Form I-485 separately, attach a copy of your filing receipt and pay only the additional sum of $650.00. In #11 and/or #12, show the answer you would have given on the date you filed Form I-485.

Part 3. Signature. Read the information on penalties in the instructions before completing this section. If someone helped you prepare this petition he or she must complete Part 4.

I certify under penalty of perjury under the laws of the United States of America, that this application, and the evidence submitted with it, is all true and correct. I authorize the release of any information from my records which the Immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

Signature /s/ Sabri Samirah
Print Your Name: SABRI SAMIRAH
Date: 4-12-95
Daytime Telephone No.: (312) 481-0352

Please Note: If you do not completely fillout this form or fail to submit required documents listed in the instructions, you may not be found eligible for the required document and this application may be denied.

Part 4. Signature of person preparing form if other than above. *(Sign Below)*

I declare that I prepared this application at the request of the above person and it is based on all information of which I have knowledge.

Signature:
Print Your Name:
Date:
Daytime Telephone No.:
Firm Name and Address:

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

HQADN70/21.1.24-P
AD 00-07
425 I STREET N.W.
WASHINGTON, D.C. 20336

[SEAL]
Office of the Executive Associate Commissioner

MEMORANDUM FOR REGIONAL DIRECTORS

DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER, IMMIGRATION SERVICES DIVISION

ACTING DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

/s/_____

FROM: MICHAEL A. PEARSON
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Period of stay authorized by the Attorney General after 120-day tolling period for purposes of section 212 (a)(9)(B) of the immigration and Nationality Act (the Act). (AD 00-07)

This memorandum addresses issues relating to the 3 and 10 year bars to admission under section 212(a)(9)(B)(i)(l) and (U) of the act and the decision to designate as a period of stay authorized by the Attorney General the entire period during which a timely filed, non-frivolous application for extension of stay (E/S) or change of status (C/S) is pending with the Service, provided the alien has not engaged in any unautho-

rized employment. This period of stay authorized by the Attorney General covers the 120-day tolling period described in section 212(a)(9)(B)(iv) of the Act, and continues until the date the Service issues a decision.

By way of background, section 121(a)(9)(B)(ii) of the Act states that an alien who is present in the United States without admission or parole, or who remains in the United States beyond the period of stay authorized by the Attorney General, accrues unlawful presence towards the 3- and 10- year bars under section 212(a)(9)(B)(i)(l) and (II) of the Act. Section 212(a)(9)(B)(iv) of the Act is a tolling provision that covers certain nonimmigrants. If an alien has timely filed a nonfrivolous application for E/S or C/S, the first 120 days of unlawful presence are not counted towards the 3-year bar under section 212(a)(9)(B)(i) of the Act. Section of the Act further states the alien must have been lawfully admitted or paroled into the United States, and must not have been employed without authorization before the E/S or C/S application was filed or while it was pending.

Although legislative history is silent regarding the intent of the 120-day tolling period, an inference may be drawn that Congress expected the Service to adjudicate the petitions within such a timeframe. However, due to unprecedented workload, in many instances the Service has been unable to adjudicate a timely filed application for E/S or C/S within the 120-day envisioned by Congress.

Under current Service policy, if a decision is not rendered within the tolling period, aliens admitted to the United States until a specific date begin accruing unlawful presence on the 121st.day after the expiration of their Form I-94. Because of the current backlogs, which in some cases extend beyond six months, aliens who remain in the United States while the C/S or E/S is pending may incur a 3-year or 10-year bar to admission if the application is ultimately is denied.

Therefore, in order to alleviate problems aliens may encounter concerning unlawful presence through no fault of their own, the Service has determined that nonimmigrants who were admitted until a specific date and who apply for C/S or E/S and whose applications have been pending beyond the 120-day tolling period should be considered to be in a period of stay authorized by the Attorney General, if certain requirements are met. Because these requirements are the same as those for tolling under section 212(a)(9)(B)(iv) of the Act, the Service has further determined that the period of stay authorized by the Attorney General covers the E/S or C/S application for the entire period that it is pending.

AS a particle matter, we note that this policy applies only to those nonimmigrants who were admitted until a specific date and whose I-94 has expired while the E/S or C/S application is pending. This is because nonimmigrants admitted for duration of status (D/S) do not begin accruing unlawful presence until a status violation is found. Refer to the Service's memorandum dated September 19, 1997, 96 Act #058, for a discussion of the Service's policy on unlawful presence as it relates to nonimmigrants admitted D/S.

This memorandum is being issued simultaneously with a separate memorandum, HQADN 70/12–P, amending the Service's 1/14/99 guidance on section 222(g), which is found in Chapter 15 of the Inspector's Field Manual (IFM). These policies and procedures are effective immediately and will be included in the AFM and in the IFM, respectively, in the next release of INSERTS.

A new Chapter 30.I(d) is added in the AFM to read as follows:

> (d) Unlawful Presence under Section 212(a)(9)(B) of the Act. (1) The 3-and 10-year bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act do not apply to:

Applicants for adjustment of status under section 202(b) of NACARA

Applicants for adjustment of status under— of HRIFA; and Registry applicants under section 249 of the Act.

(2) Counting For Unlawful Presence for Nonimmigrants. An alien who remains in the United States beyond the period of stay authorized by the Attorney General is unlawfully present and becomes subject to the 3 or 10 year bars to admission under section 212(a)(9)(B)(l)(l) and (ll) of the Act. Under current Service policy, unlawful presence is counted in the following manner for nonimmigrants.

(A) Nonimmigrants Admitted until a Specific Date. Nonimmigrants admitted until a specific date begin accruing unlawful presence on the date the period of admission authorized by the Service expires, as noted on the arrival document issued at the port-of-entry.

(B) Nonimmigrants Admitted Duration of Status (D/S). Nonimmigrants admitted to the United States for D/S begin accruing unlawful presence on the date the Service finds a status violation while adjudicating a request for another immigration benefit, or on the date an immigration judge finds a status violation in the course of proceedings. If, however, the immigration judge concurrently issues voluntary departure and the alien complies with the order by making a timely departure, no unlawful presence accrues. See sections(dx2) and (dx5) of this chapter regarding voluntary departure as a period of stay authorized by the Attorney General.

(3) Period of Stay Authorized by the Attorney General. The Service has also designated the following as periods of stay authorized by the Attorney General:

Voluntary departure;

Refugee status;

Asylee status;

Grants of withholding or deferral of removal under the United Nations Convention Against Torture;

Legalization and special agricultural worker applications for lawful temporary residence which are pending through administrative appeal;

Grants of withholding or suspension of deportation, or cancellation of

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